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No. 87-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D. H. HOLMES CO., LTD.,
Appellant,

v.

SHIRLEY MCNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Appellee.

**On Appeal from the Court of Appeal,
Fourth Circuit,
State of Louisiana**

BRIEF OF R. R. DONNELLEY & SONS COMPANY, MAGAZINE PUBLISHERS OF AMERICA, INC., AND PRINTING INDUSTRIES OF AMERICA AS *AMICI CURIAE*

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QUESTION PRESENTED

Whether the Commerce Clause permits a State to impose a use tax directly upon a company's purchase outside of the state of services, such as the design and printing of catalogs, when those catalogs are mailed to residents of the State.

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BRIEF OF R. R. DONNELLEY & SONS COMPANY, MAGAZINE PUBLISHERS OF AMERICA, INC., AND PRINTING INDUSTRIES OF AMERICA AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Amicus R. R. Donnelley & Sons Company ("Donnelley") is a Delaware corporation, with its principal place of business in Chicago, Illinois. Donnelley is the largest printer of merchandise catalogs in the United States, serving both de-

partment stores and mail order customers. It owns and operates printing plants in 15 states and prints merchandise catalogs for major national department stores and direct mail retailers.[1]

At issue in this case is the State of Louisiana's power to tax directly the out-of-state design and printing of catalogs produced in New York, Oklahoma and other states once those catalogs are mailed to Louisiana residents. Donnelley frequently provides the type of services which the State seeks to tax. Accordingly, Donnelley wishes to explain why the Commerce Clause prohibits Louisiana from taxing the out-of-state transactions at issue here.[2]

Amicus Magazine Publishers of America, Inc. ("MPA") is a national organization that represents the interests of more than 200 companies engaged in the publication of approximately 800 consumer-interest magazines. Members of MPA distribute the magazines that they publish via the United States mail to subscribers throughout the United States and the world. Accordingly, the MPA has an interest in presenting its views because of the potential impact on its operations of the Court's holding in this case concerning the states' authority, under the Commerce Clause, to impose a tax on the interstate distribution of magazines.

Amicus Printing Industries of America ("PIA") is the largest national trade association of the printing and graphic arts industry. PIA represents approximately 10,000 companies in the United States and its members are responsible for approximately 85 percent of the gross sales of the industry. Because of the potential impact of the Court's decision in this case on interstate sales of printing services and on interstate distribution of printed material, the PIA seeks to present its views concerning the authority of the states, under the Commerce Clause, to impose a tax on the transactions at issue in this case.

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1 In 1986, Donnelley printed and mailed 4.3 billion pieces of mail of which 2.9 billion pieces were catalogs, flyers and similar merchandise advertisements. In 1986, Donnelley accounted for 5.3 percent of all third class mail delivered by the United States Postal Service.

2 Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of those letters have been filed with the Clerk of the Court.

STATEMENT

Amici adopt appellant's statement of the case and emphasize the following facts:

1. Appellant D.H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation with its principal place of business in New Orleans, Louisiana. Appellant operates department stores within Louisiana as well as several other states. From 1979 to 1981, appellant contracted with New York companies to design and prepare merchandise catalogs, which were printed outside of Louisiana in Boston, Massachusetts, Oklahoma City, Oklahoma and Atlanta, Georgia. Once the catalogs were prepared, the printing companies delivered them, postage prepaid, to the offices of the United States Postal Service in the state in which they were printed and mailed them directly to appellant's customers.[3] The catalogs, which were provided at no charge to the recipient, contained instructions to the postal carrier to leave them with the current resident if the addressee had moved. J.S. App. 4a.

Although appellant purchased the catalogs for the use of its customers and the promotion of its business,[4] it is undisputed that neither appellant nor any of its agents ever had any possession or control of the vast majority of the catalogs delivered within Louisiana.[5] Indeed, as a practical matter, the possession and use of the catalogs was wholly beyond appellant's control once the printers placed them in the United State mail outside of Louisiana.

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3 Eighty-two percent (82%) of the catalogs were delivered to residents of Louisiana.

4 The catalogs were not provided to encourage mail order sales because Holmes did not then, and does not now, conduct a mail order business.

5 There were some minor exceptions to this distribution pattern. The court below found that a small number (approximately 1000) of the catalogs were distributed by appellant from its Canal Street store in New Orleans (J.S. App. 7a) and Holmes paid the tax on these catalogs without protest. Appellee states that some of the catalogs were returned by the United States Postal Service to Holmes at the store that was listed as the return address for the catalog delivery. Motion to Dismiss, 2.

2. The Louisiana statutes at issue impose a tax upon:

> "the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of each item or article of tangible personal property. . . ."

La. Rev. Stat. 47:302(A); La. Rev. Stat. 47:321(A). In this case the state has imposed a use tax based on the "cost" of the catalogs distributed in Louisiana in 1979-1981—a two percent tax on "the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state." La. Rev. Stat. 47:302(A)(2). The statute defines "use" to include "the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business." La. Rev. Stat. 47:301(18).

Louisiana has a complementary sales tax on goods of two percent on "the sales price of each item or article of tangible personal property when sold at retail in this state." La. Rev. Stat. 47:302(A)(1). That tax is not applicable here because Holmes purchased the catalogs outside of Louisiana. However, if the catalogs at issue here had been printed in Louisiana, they would have been taxed, not as a sale of goods, but at the two percent rate on "sales of services. . . in this State." La. Rev. Stat. 47:302(C). The statute defines "sales of services" to include "the furnishing of printing or overprinting, lithographic, multilith, blue printing, photostating or other similar services of reproducing written or graphic matter. . . ." La. Rev. Stat. 47:301(14)(d).

In Louisiana a sales or use tax may be collected from any "dealer," a term that is broadly defined to include any person who has "used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property" (La. Rev. Stat. 47:301(4)(c)), or who "sells or furnishes any of the services subject to tax under this Chapter (La. Rev. Stat. 47:301(4)(f)), or who "purchases or receives any of the services subject to tax under this Chapter." La.

Rev. Stat. 47:301(4)(g). Thus, Louisiana's statute is sufficiently broad to allow the State to tax (1) the recipients of the catalogs; (2) the purchaser, Holmes, or (3) the out-of-state companies that printed the catalogs. Finally, the Louisiana statute provides that:

> "It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bonafide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible property after it has come to rest in this state and has become a part of the mass of property in this state."

La. Rev. Stat. 47:305(E).

The Louisiana Department of Revenue and Taxation assessed a use tax against Holmes based upon the cost of all catalogs mailed directly to Louisiana residents. Holmes protested the State's assessment of the tax.

3. The State filed this suit in the Louisiana Civil District Court for the Parish of Orleans, seeking to recover the amount of the use tax which Holmes refused to pay. Holmes, in its answer to the lawsuit, expressly raised the defense that the imposition directly upon Holmes of the use tax as a purely interstate transaction violated the Commerce Clause.

The trial court found that the distribution of the catalogs within Louisiana "w[as] intended for the use of D. H. Holmes in increasing its sales to potential customers who are residents of Louisiana" and that appellant could be taxed on this "use" of the catalogs. J.S. App. 22a. Moreover, the court found that "[o]nce the catalogs reach the residences of the prospective customers to whom they are addressed, Louisiana taxing authority reaches the resting place of the catalogs . . . ." J.S. App. 22a. Therefore, the trial court spe-

cifically rejected Holmes' contention that such an application of the statute violated the Commerce Clause.

The Louisiana Court of Appeal, Fourth Circuit, affirmed. It found that "[d]istribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." *Id.* With respect to the state's power to tax, the Court of Appeal stated that the "taxable moment occurs 'when the property has been withdrawn from interstate commerce and has become part of the mass of property of the taxing state.' " J.S. App. 7a. In the circumstance of this case, the court held that "[a]fter the catalogs were in Louisiana mailboxes, they were not part of interstate commerce and became part of the property mass in this state." *Id.*

Because Holmes is located in the State of Louisiana, the court concluded that the Commerce Clause requirement, that the activity taxed have a "substantial nexus" with the state, was satisfied. J.S. App. 8a-9a. The court also stated that the tax "does not create dissimilar treatment" between in-state and out-of-state taxpayers and, therefore, the tax does not discriminate. J.S. App. 9a. Finally, the court noted that no other state taxes the printing services used by Holmes and therefore the tax is fairly apportioned. Accordingly, the court concluded that, under the four-part test established in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), imposition of the tax on Holmes for the interstate distribution of its catalogs does not violate the Commerce Clause. J.S. App. 9a.

A petition for a writ of certiorari to the Supreme Court of Louisiana was denied. J.S. App. 11a. This Court noted probable jurisdiction on November 2, 1987. 56 U.S.L.W. 3312 (Nov. 3, 1987).

SUMMARY OF ARGUMENT

1. A state tax on interstate commerce may be upheld only if it (1) is "applied to activity with a substantial nexus with the State", (2) is "fairly related to the services provided by the State"; (3) does "not discriminate against interstate

commerce"; and (4) is "fairly apportioned." *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). The first two factors of the test—the "jurisdictional" or "nexus" requirements—exist because "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753 (1967) (quoting *Freeman* v. *Hewit*, 329 U.S. 249 (1946)).

In the instant case, the State of Louisiana has no nexus to the "activity" at issue: the design and printing of the catalogs out-of-state and their distribution through the United States mail to Louisiana residents. With certain minor exceptions not issue here, Holmes, the in-state "purchaser" of the catalogs, never had possession of the catalogs within the State. Clearly, Louisiana provides no services in connection with the design and printing or the distribution of the catalogs through the United States mail and thus, with respect to these transactions, Louisiana has not "given anything for which it can ask return." See *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

Louisiana's nexus to the taxpayer, Holmes, is insufficient, standing alone, to satisfy the Commerce Clause requirements for taxing this activity. If nexus to the taxpayer were sufficient, the State could impose a tax on all transactions entered into by local business, regardless of where the transaction occurred. However, this Court clearly has held otherwise. See *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965). In addition, the State's argument that out-of-state printers will have an "advantage" unless this tax is upheld also is insufficient, as a matter of law, to uphold the tax against Commerce Clause challenge. *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938). In fact, the tax in question does not "equalize" the burden between in-state and out-of-state printers. Instead, the financial and administrative burden on Holmes of a use tax for employing an out-of-state printer is greater than the burden of a sales tax for use of an in-state printer.

Finally, Louisiana should not be permitted to uphold this tax based on its strained and artificial argument that Holmes "owned" the catalogs at the time that they came to rest in its customers' mailboxes within the state. This Court's analysis of a state's power to tax focuses on "economic realities" —not on abstract notions of ownership. The record conclusively demonstrates that Holmes' customers were the only parties to "use" the catalogs within the State of Louisiana, and the State does not choose to tax their "use" of the catalogs.

2. In *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), this Court held that the State of Illinois could not compel a mail order company to collect a use tax on out-of-state purchases of goods by Illinois residents when the State's only connection with the transaction was the delivery of the goods "via the United States mail or common carrier." *Id.* at 754. This Court noted that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Id.* at 759.

The instant case involves indistinguishable out-of-state "transactions" that have no greater nexus to the state than did the transactions at issue in *Bellas Hess.* Moreover, the fact that Holmes is present in Louisiana is not a basis to tax these out-of-state "transactions." *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938). As this Court has noted, if state power to tax such interstate transactions is upheld, interstate business will become "entangle[d] . . . in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of local government.' " *Bellas Hess,* at 759-760 (footnotes omitted). It is clear that the State of Louisiana cannot demonstrate that the transaction or activity at issue is sufficiently connected to the State to justify directly imposing the use tax upon Holmes. See *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977), and cases cited therein. Thus, the use tax imposed by the State fails to satisfy the minimum requirements of the Commerce Clause and must be struck down.

3. Finally, the imposition of the use tax on the catalogs in this case is analogous to the imposition of a state tax on interstate communications. Despite Louisiana's extraordinary efforts to characterize the catalogs as "goods" and to explain how Holmes "uses" the goods that it never possesses or controls the catalogs are at bottom nothing more than a medium by which Holmes communicates with its customers regarding the quality and cost of its merchandise. Accordingly, the tax in this case is nothing more than a state tax on interstate communications, which this Court clearly has prohibited. See, *e.g., Fisher's Blend Station* v. *State Tax Comm'n,* 297 U.S. 650 (1936); *Cooney* v. *Mountain States Tel. Co.,* 294 U.S. 384 (1935).

ARGUMENT

LOUISIANA'S IMPOSITION ON HOLMES OF THE USE TAX ON CATALOGS SENT BY OUT-OF-STATE PRINTERS THROUGH THE UNITED STATES MAIL TO LOUISIANA RESIDENTS VIOLATES THE COMMERCE CLAUSE

The instant case presents a novel application of this Court's well-established requirements for determining when the Commerce Clause permits a state to levy a use tax on goods in interstate commerce. Generally, a use tax is imposed as a percentage of the cost price of goods purchased outside the state but used or consumed within the state. La. Rev. Stat. § 47:302; see *Miller Bros.* v. *Maryland,* 347 U.S. 340, 343 (1954); *Henneford* v. *Silas Mason, Co.,* 300 U.S. 577 (1937); see generally Powell, *Sales and Use Taxes: Collection from Absentee Vendors,* 57 Harv.L.Rev. 1086 (1944). The use tax is imposed on the purchaser of the goods, but, to ensure enforcement of the tax laws, the obligation to collect the tax is imposed on the seller. La. Rev. Stat. §§ 47:303, 47:301(4); see *Miller Bros.,* 347 U.S. at 343; *National Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753, 757 n.9 (1967).

This Court has held that the obligation to collect a use tax cannot be imposed on an out-of-state seller engaged in exclusively interstate transactions unless there is " 'some definite link, some minimum connection, between a state

and the person, property or transaction it seeks to tax.' " *Bellas Hess*, 386 U.S. at 756 (quoting *Miller Bros.*, 347 U.S. at 344-45). In the present case, the obligation to collect the tax has not been imposed on the out-of-state seller (*i.e.*, the printer) because the State of Louisiana has no connection to the out-of-state printer and could not constitutionally impose on the printer the obligation to collect any tax. Faced with this obstacle, the State instead has imposed the use tax on Holmes, the "purchaser" of the catalogs.[6]

Thus, the issue is whether the Commerce Clause permits the State to require Holmes to pay a use tax on the cost of the catalogs distributed to residents of the State, despite Holmes' purchase of the printing and design of the catalogs outside of Louisiana and Holmes' lack of control over the catalogs after they have left the hands of the printers.[7]

I. THE LOUISIANA USE TAX VIOLATES THE COMMERCE CLAUSE AS APPLIED TO A TRANSACTION IN INTERSTATE COMMERCE WHICH HAS NO NEXUS TO THE TAXING STATE

This Court has enunciated a four-part test for determining whether a state tax can survive challenge under the Commerce Clause. A tax may be upheld only if it (1) is "applied to activity with a substantial nexus with the State";[8] (2) is

6 The Louisiana Court of Appeal stated that the "[d]istribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the 'use' tax." J.S. App. 7a.

7 Other state courts have reached a conclusion contrary to that of the Louisiana courts. See, *e.g.*, *District of Columbia* v. *W. Bell & Co.*, 420 A.2d 1208 (D.C. 1980); *Hoffmann-LaRoche, Inc.* v. *Porterfield*, 243 N.E.2d 72 (Ohio 1968); *Mart Realty, Inc.* v. *Norberg*, 303 A.2d 361 (R.I. 1973); *Bennett Bros.* v. *State Tax Comm'n*, 405 N.Y.S.2d 803 (1978).

8 This requirement, under the Commerce Clause, of "nexus" to the person and transaction taxed is "closely related" to the test for determining whether a state tax may survive scrutiny under the Due Process Clause. *Bellas Hess*, 386 U.S. at 756. That determination turns on the "simple but controlling question [of] whether the state has given anything for which it can ask return." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940); see *Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952).

"fairly related to the services provided by the State"; (3) does "not discriminate against interstate commerce"; and (4) is "fairly apportioned." *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). The first two requirements of the test—the "jurisdictional" or "nexus" requirements—exist because "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753 (1967) (quoting *Freeman* v. *Hewit*, 329 U.S. 249 (1946). In addition, the "nexus" requirement serves the prophylactic function of ensuring that over-reaching state taxation does not impede the "free flow of trade between the States." See L. Tribe, *American Constitutional Law*, 347 (1978); *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).[9]

The Louisiana use tax, as applied to the activity at issue in this case, fails to meet the first two requirements of the four-part test. In the instant case, there is no nexus between Louisiana and the sale of the catalogs or the services required to create the catalogs, all of which occurred outside of the State. In fact, Louisiana has no connection at all to the transaction at issue—the design and printing of catalogs, purchased out-of-state, and their distribution through the United States mail to residents of Louisiana. With certain minor exceptions, which are not at issue, see, *supra*, note 5, Holmes, the in-state purchaser, never had possession or control of the catalogs within the State. Thus, the application of the State's use tax runs squarely into "the limitation of use taxes to consumption within the State" which is required to avoid taxing interstate commerce directly. *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 555 (1977).

9 The latter two factors (3) and (4) in the test are designed to ensure that those economic interests that lack political representation in the state do not unfairly bear the brunt of state taxation, at the expense of interstate commerce. See *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45-46 n.2 (1940); *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946).

Stated differently, Louisiana provides no services in connection with the distribution of the catalogs in question; they travel by United States mail from the out-of-state printers directly to residents of Louisiana and other states. Thus, Holmes cannot be asked to pay for the "use" of these catalogs which Holmes' Louisiana customers receive because the State has not "given anything" with respect to the creation or distribution of catalogs "for which it can ask return." See *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. at 444.

Louisiana, however, makes three arguments by which it seeks to overcome this lack of nexus to the transaction. First, Louisiana emphasizes its substantial nexus to the *taxpayer* in this case—the purchaser of the goods, Holmes. But, as should be plain from the description above of the Court's Commerce Clause jurisprudence, this Court has required that the state, before taxing an interstate transaction directly, must demonstrate some connection to the transaction or "activity" taxed, not just to the taxpayer. *Washington Stevedoring*, 435 U.S. at 750; *Bellas Hess*, 386 U.S. at 759 ("it is difficult to conceive of commercial *transactions* more exclusively interstate in character than the mail order transactions here involved") (emphasis added).

In circumstances where the state merely seeks to impose the obligation to *collect* the use tax (from in-state purchasers) on the "out-of-state" seller, this Court has held that the states' minimum contacts with the seller are sufficient and that the seller's in-state contacts need not be related to the out-of-state sales or transactions. See, *e.g.*, *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 560 (1977). In the present case, however, Louisiana is seeking to impose the use tax *directly* on the purchaser—Holmes—and not simply to require an out-of-state seller to *collect* the tax. Thus, what is "fatal" to the constitutionality of the tax is the fact that it is a direct tax being imposed on an out-of-state transaction, which is "dissociated from the local business" of Holmes. *National Geographic*, 430 U.S. at 560 (quoting *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965)); *Norton Co.* v. *Illinois Revenue Dep't*, 340 U.S. 534, 537 (1951).

If the rule were otherwise and mere presence of the taxpayer in the state were a sufficient nexus to impose a tax, then states could impose a tax on all transactions entered into by local businesses, regardless of where the transaction took place. But, clearly that is not the law. Compare *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 348 (1944) (Indiana sales tax on sale by local company to out-of-state customer upheld where "[t]he consummation of the transaction was an event within the borders of Indiana.") with *American Oil Co.* v. *Neill*, 380 U.S. 451, 458-59 (1965) (Idaho sales tax on sale by company licensed to do business in Idaho struck down on Commerce Clause grounds where sale negotiated and delivery made outside of Idaho). Louisiana has not taxed Holmes for the catalogs which were sent from the printers to Holmes' customers outside of Louisiana because it is, by statute, limited to taxing property that has "become a part of the mass of property in this state." La. Rev. Stat. 47:305(E). However, absent this statutory limitation, if mere nexus to the taxpayer were a sufficient basis for a state's taxing authority, there is no reason why the catalogs distributed to Holmes' out-of-state customers could not also be taxed. In the present case, the State of Louisiana simply has failed to demonstrate "a sufficient 'nexus between such a tax *and transactions* within a state for which the tax is an exaction.' " See *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 464 (1959) (emphasis added).[10]

Second, the State argues that taxing Holmes on the distribution of the catalogs to Holmes' customers is necessary to avoid giving the out-of-state printers (*i.e.*, the sellers in this case) an advantage over in-state printers, who presumably would be required to collect the tax on their services if such catalogs were manufactured and sold within Louisiana. In effect, Louisiana argues that its statute is necessary to avoid discrimination against in-state printers and to collect

[10] *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80-81 (1938) ("a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.")

from Holmes its "fair share of the cost of local government." Both of these arguments are flawed.

In the first place, any "advantage" gained by interstate commerce in escaping local tax burdens does not justify imposing a tax on such commerce, particularly when it could entangle Holmes "in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.' " See *Bellas Hess*, 386 U.S. at 759-760; *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) ("a tax, otherwise unconstitutional, is not converted into a valid exaction merely because . . . the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within").

Moreover, the State's "unfair advantage" argument ignores the fact that Holmes pays sales tax on every item it sells. If, in fact, Holmes' catalogs generate additional sales at Holmes' stores within the State, then the State will receive the tax generated by the catalogs. Indeed, since Holmes almost certainly includes the cost of the catalogs in the price of the goods it sells, it already is taxed on the cost of the catalogs. It defies economic reality, which is the touchstone of Commerce Clause analysis, to suggest that Holmes will somehow "escape" sales tax if the State is unable to collect the tax on the interstate distribution of its merchandise catalogs.

But, in any event, if Louisiana's right to impose this use tax is affirmed, the tax burden imposed on in-state printing of catalogs will very likely be far less than the tax burden imposed for out-of-state printing of catalogs. Under the Louisiana statutes, a sale of printing services in-state is taxable by the state and by the single parish and municipality in which the sale takes place. La. Rev. Stat. 33:2711, La. Rev. Stat. 33:2721, and La. Rev. Stat. 33:2737. If out-of-state printing is taxable under the use tax, *every* parish (and municipality) where the catalogs are used or consumed will be permitted to collect a local tax from Holmes. There are 228 jurisdictions in Louisiana which now have authority to levy

such a tax. Each of these jurisdictions requires the filing of a separate monthly tax return and imposes a tax rate that varies from the rate imposed by other jurisdictions. The cumulative burden of using an out-of-state printer (and then paying the use tax to the state and to *each* local government) will not equal but will, in fact, far exceed the in-state printer's burden of paying a single state sales tax. Louisiana State Tax Reporter (CCH) ¶ 75-991 (1987).

Additionally, the State's imposition of a use tax on the *cost price* of the catalogs results in the imposition of the tax on a higher "cost" basis than would have been the case if these catalogs had been produced by Louisiana companies. From the record, it appears that Holmes contracted with New York companies to design the catalogs and those companies contracted with printers in Boston, Oklahoma City and Atlanta to print and mail the catalogs. Under the Louisiana statute, if these services had been provided in Louisiana, Holmes would have been taxed on a sale of services which includes "the furnishing of *printing* . . . or other similar *services* of reproducing written or graphic matter" (La. Rev. Stat. 47:301(14)(d)), (emphasis added) but does *not include* the cost of designing or mailing the catalogs. *Dunham Rentals Inc.* v. *West Feliciana Parish School Bd.*, 241 So. 2d 295, 297 (Ct. App., 1st Cir. 1970). Thus, Holmes would pay tax on a larger tax base (*i.e.*, a base which included design and mailing costs) by having the catalogs printed out of state than it would have paid if the catalogs had been printed in Louisiana. A similar infirmity caused this Court to strike down Louisiana's attempt to impose its use tax on out-of-state manufacturers where a similar tax base was applied to in-state manufacturers. *Halliburton Oil Well Co.* v. *Reilly* 373 U.S. 64, 70-71 (1963).

Louisiana's final argument is that, as a matter of state law, Holmes "owned" the catalogs at the moment that they "came to rest in Louisiana by placement into . . . the recipient's mail or post office box." Motion to Dismiss, 3. This argument is nothing more than a strained and artificial conceptualization designed to conceal the truth that Holmes at no time had possession, control, or use of, or contact with,

the catalogs within the State of Louisiana.[11] See, *supra*, *p. 4*. Although the State clearly is free to interpret the meaning of the term "use" under its own statute, this Court's analysis of the State's jurisdiction to tax under the Commerce Clause must be focused on "economic realities"—not abstract principles. See *Complete Auto Transit*, 430 U.S. at 274. Thus, the State could just as easily argue as a constitutional matter that the catalog(s) sent to a resident just across the border in Texas is a "use" in Louisiana because the purpose of the catalog is to bring that Texas resident into Holmes' store in Louisiana. But that definition of "use" cannot obscure the fact that Louisiana lacks the power to tax that transaction. Similarly, whether or not Louisiana deems a resident's use to be attributable to Holmes does not supply any basis for the Court to uphold the State's tax against a Commerce Clause challenge.

The State of Louisiana should not be permitted to achieve through distortions of state law what the Commerce Clause prohibits. Holmes' customers, who received the catalogs through the United States mail, were the only persons within the jurisdiction of the State to own and possess the catalogs in question. Accordingly, the lack of any nexus—direct or indirect—between the state and the transaction taxed renders the tax at issue impermissible under the Commerce Clause.

II. The Louisiana Use Tax At Issue Violates The Commerce Clause Under The Holding In National Bellas Hess

The issue of whether the shipment of goods, by United States mail, into the taxing state creates a sufficient "nexus" with the state to justify imposition of a use tax on those goods was resolved conclusively by this Court in *National*

[11] Adoption of this metaphysical ownership theory effectively would allow Louisiana's interpretation of the state law of ownership to "overrule" *Bellas Hess*. See, *infra*, *pp. 18-19*. It is clear that Bellas Hess—like Holmes—could have been deemed, under Louisiana law, to have "owned" the mail order goods at the time those goods "came to rest" in the mailbox of its customers.

Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). In that case, the obligation to impose and collect the Illinois use tax was imposed on an out-of-state mail order company whose only contact with its Illinois customers was "via the United States mail or common carrier." *Id.* at 754. This Court noted that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Bellas Hess*, 386 U.S. at 759. Because of the lack of nexus between the State of Illinois and the *transactions* (*i.e.*, the out-of-state sales) at issue, this Court held that the Illinois use tax on goods mailed by Bellas Hess to its Illinois customers violated the Commerce Clause. The Court explained why the absence of a state nexus to the transactions posed a threat to the free flow of goods in interstate commerce:

> [I]f the power of Illinois to impose use tax burdens upon [National Bellas Hess] were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. . . . The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping entanglements could entangle [National Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

Bellas Hess, 386 U.S. at 759-760 (footnotes omitted). The nexus between the State of Louisiana and the transactions at issue in the present case is no greater than that found insufficient to permit the use tax in *Bellas Hess*. In the present case, the Louisiana purchaser (Holmes) contracted with an out-of-state designer and out-of-state printers to prepare and deliver catalogs to Holmes' customers. As in *Bellas Hess*, the entire transaction took place outside of the taxing state except for the final delivery of the catalogs "via the United States mail . . . ." See *Bellas Hess*, 386 U.S. at 754. Thus, it is clear, that the out-of-state printers (*i.e.*, the sellers of the catalogs) could not be required to collect any use tax. But Louisiana seeks to avoid the Commerce Clause impediment inherent in *Bellas Hess* by requiring that the in-state

purchaser (Holmes)—rather than the out-of-state seller—pay the tax. This it cannot do.

The fact that the purchaser of the catalogs, Holmes, resides within Louisiana does not render the tax on the transaction at issue permissible under the Commerce Clause. Although Louisiana clearly possesses jurisdiction over Holmes, it is not enough for purposes of direct taxation to have the taxpayer within the Court's jurisdiction. The State must also have some tangible relationship with the taxable event or transaction. *Miller Bros.* v. *Maryland*, 347 U.S. 340, 343 (1954); *Conn. Gen. Life Ins. Co.* v. *Johnson*, *supra* at 80-81; see, *supra*, at 11-13. Neither the courts below nor the State of Louisiana has made any effort to demonstrate that the transaction or activity at issue—the out-of-state purchase of the catalogs and shipment, via United States mail, to Holmes' customers—is "sufficiently connected" to Louisiana, in any real sense, to justify the tax. *Complete Auto Transit*, 430 U.S. at 287; *Washington Stevedoring*, 435 U.S. at 750. Accordingly, the use tax imposed by the State fails to satisfy the minimum requirements of the Commerce Clause and must be struck down.

III. THE LOUISIANA USE TAX AT ISSUE VIOLATES THE COMMERCE CLAUSE AS A TAX ON INTERSTATE COMMUNICATIONS

The imposition of a use tax on these merchandise catalogs is closely analogous to various state taxes on interstate communications which have uniformly been struck down by this Court. At bottom the catalogs serve only as communications about, or advertising of, Holmes' merchandise. This Court has disallowed a state occupation tax on local radio stations measured by the gross receipts from radio broadcasting as an unconstitutional burden on interstate commerce. *Fisher's Blend Station* v. *State Tax Commission*, 297 U.S. 650, 655 (1936) ("By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."). Similarly, the Commerce Clause has been held to prohibit state taxation of the revenues derived from interstate messages sent by telegraph (*Telegraph Company* v. *Texas*, 105 U.S. 460 (1881)) and an occupation tax applied to a local telephone company based on the number of telephones it owned because they were used for both intrastate and interstate communications. *Cooney* v. *Mountain States Tel. Co.*, 294 U.S. 384 (1935).

The use tax at issue here is not imposed on goods that have been purchased out of state and brought into Louisiana by Holmes for use or consumption. Despite the State's strained characterization of the tax as being imposed upon Holmes' "use," the Louisiana tax is, in effect, a tax on Holmes' interstate communications with its customers. This the Commerce Clause does not allow. Holmes' merchandise advertisements could not have been taxed by Louisiana had they been broadcast by radio or television or transmitted to customers by telegraph. No practical justification exists for allowing the communications to be taxed simply because Holmes chooses to deliver its advertisements via the United States mail in the form of merchandise catalogs.

CONCLUSION

The judgment of the Louisiana Court of Appeal, Fourth Circuit, should be reversed.

Respectfully submitted,

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